organization's] duties" ("the principle of necessary implication").[19] Each of these principles creates an absolute bar to INMARSAT's establishment of the Affiliate.

1. The Principle of Natural Meaning

The principle of natural meaning states that "particular words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur."[20] The Vienna Convention codifies this principle as the fundamental rule of treaty interpretation:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[21]

Only where application of the above principle of interpretation "leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable" may "supplementary means of interpretation" be employed.[22]

In the Competence of the General Assembly Case, the International Court of Justice ruled on the question presented in the instant case: whether an international organization may exercise a power not expressly granted it by its constitutive treaty. The specific question before

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[19] Reparation Case, 1949 I.C.J. at 182.

[20] 1 Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 345 (1986) ("This meaning can only be displaced by direct evidence that the terms used are to be understood in another sense than the natural and ordinary one, or if such an interpretation would lead to an unreasonable or absurd result.").

[21] Vienna Convention, art. 31(1).

[22] Vienna Convention, art. 32.

the Court was whether the General Assembly of the United Nations can admit a State where it has received no recommendation from the Security Council on the question and where the relevant article of its constitutive treaty states that "admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."[23/] Noting that "[i]n one of the written statements placed before the Court, an attempt was made to attribute to paragraph 2 of Article 4 a different meaning," the Court stated:

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. . . . When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning.[24/]

The Court, which found "no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them," held that no recourse could be had to supplementary means of interpretation[25/]

[23/] U.N. Charter art. 4, ¶ 2.

[24/] Competence of the General Assembly Case, 1950 I.C.J. at 8 (emphasis added).

[25/] Id. at 8. The "supplementary means" at issue here was consultation of the travaux préparatoires.

and, hence, that the General Assembly did not have the power to act contrary to the plain language of its Charter.[26/]

In asserting that the language of Article 15 of the Convention imposes two "mutually inconsistent" requirements on INMARSAT,[27/] the C&M Letter ignores the fact that the phrase "consistent with this Convention and the Operating Agreement" qualifies the phrase "most economic, effective and efficient manner." In fact, the phrase "most economic, effective and efficient manner" is subordinated to the primary requirement that any action taken by INMARSAT be "consistent with this Convention and the Operating Agreement." By its terms, Article 15 absolutely prohibits the Council from taking any action that is not "consistent with th[e] Convention and the Operating Agreement," whether or not such action is economic, effective, or efficient. Because Article 15 is neither "ambiguous," "obscure," nor "manifestly absurd or unreasonable,"[28/] there is no authority in international law for looking beyond the plain language of the Convention and Operating Agreement for "supplementary means" to interpret the Convention and Operating Agreement. As Article 31 of the Vienna Convention and the Competence of the General Assembly Case make clear, the Convention may not be interpreted in a strained and unnatural manner to reach a desired end where the Convention's plain language produces a meaning that is clear and reasonable.

[26/] Id. at 10. Likewise, in Lithgow and Others, 1984 European Court of Human Rights, ser. A, No. 102, para. 114, 75 I.L.R. 438, 482, the European Court of Human Rights refused to interpret the European Convention for the Protection of Human Rights and Fundamental Freedoms so as to extend to nationals the same standards of compensation for nationalization of property that applied to aliens. In so doing, it declined the invitation to imply this power on the basis of a reference in the Convention to "the general principles of international law," citing in support of its decision Article 31 of the Vienna Convention.

[27/] C&M Letter at 17.

[28/] Vienna Convention, art. 32.

Even assuming, arguendo, that application of the "doctrine of implied powers" to the question of INMARSAT's ability to create an Affiliate were not barred by the natural meaning principle, application of this doctrine to this question is further barred by the principles of contrary intention and necessary implication.

2. The Principle of Contrary Intention

Under the principle of contrary intention, the "doctrine of implied powers" is inapplicable where the constitutive treaty manifests an intention contrary to the proposed implication of power.[29/] In the Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania (second phase), 1950 I.C.J. 221, 229, the International Court of Justice refused to attribute to the treaty provisions in question a meaning that would be contrary to their letter and spirit. Similarly, in Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, the Court decided that the General Assembly impliedly possessed the power to establish a tribunal to adjudicate claims for compensation brought by U.N. staff members only after the Court determined that the United Nations' Charter contained "no indication to the contrary."[30/]

[29/] International Status of South-West Africa, 1950 I.C.J. 120, 187 ("It is an acknowledged rule of interpretation that treaty clauses must not only be considered as a whole, but must also be interpreted so as to avoid as much as possible depriving one of them of practical effect for the benefit of others. This rule is particularly applicable to the interpretation of the text of a treaty of a constitutional character like the United Nations Charter.") (de Visscher, J., dissenting); Campbell, supra note 12, at 524 ("If the adoption of a power is actually prohibited in express terms then such a power could surely not be implied or exercised").

[30/] 1954 I.C.J. at 56.

As noted above, the C&M Letter concedes that the structure of the Affiliate "cannot be reconciled with the Operating Agreement." C&M Letter at 17. There could be no clearer admission that INMARSAT's constitutive instruments manifest an intention contrary to the establishment of the Affiliate. Hence, the principle of contrary intention absolutely bars INMARSAT from establishing the Affiliate under the purported authority of the "doctrine of implied powers."

3. The Principle of Necessary Implication

The C&M Letter not only fails to give the Convention its natural meaning and ignores the principle of contrary intention but it overstates the breadth of the "doctrine of implied powers." Observing that "[p]articular care should be taken to avoid an automatic implication" of powers, Professor Brownlie cautions:

> "Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted."[31/]

The International Court of Justice fully articulated the "doctrine of implied powers" for the first time in 1949 in the Reparation Case.[32/] In that case, the Court was called on to decide whether the United Nations has the power to bring an international claim against a State on behalf of a United Nations employee or agent injured in the performance of his duties where that power is not expressly set forth in the Charter.[33/] The Court reasoned (1) that the United Nations functioned only through its employees and

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31/ Brownlie, supra note 8, at 690-91 (quoting the Reparation Case, 1949 I.C.J. at 198 (Hackworth, J., dissenting)).

32/ 1949 I.C.J. 174.

33/ 1949 I.C.J. at 176-77.

agents, (2) that the power to bring international claims on behalf of its personnel was essential to their protection and, (3) hence, to their ability to perform their duties, which (4) are the duties of the United Nations itself. It concluded that "the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of [its] Charter."[34/] Implicit in this decision is the Court's recognition that the power to bring claims on behalf of its agents is essential to the United Nations' ability to carry out its mission.

The C&M Letter concedes, as it must, that powers not expressly granted an international organization in its constitutive treaty may be inferred only "by necessary implication as being essential to the performance of [the organization's] duties."[35/] Yet the C&M Letter carefully skirts the question whether the establishment of the Affiliate is indeed "essential" to achieve the objectives of the Convention.[36/]

In fact, it cannot be seriously contended that creation of the Affiliate is "'necessary' to the exercise of powers expressly granted."[37/] In order to overcome the strong legal presumption against implying powers to an international organization that are not expressly granted by its constitutive treaty, it would have to be shown that creation of the Affiliate is "essential" to provide land mobile services. The C&M Letter merely assumes that creation of the Affiliate is "the most economic, effective and efficient manner" of providing land mobile services. This is a far cry from establishing that creation of the Affiliate is an economic necessity for INMARSAT. It is farther yet from satisfying the exacting standard laid down

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[34/] 1949 I.C.J. at 184.

[35/] C&M Letter at 12 (quoting Reparation Case, 1949 I.C.J. at 182).

[36/] The C&M Letter at 13 says only that changing conditions "may demand" the creation of the Affiliate.

[37/] Brownlie, supra note 8, at 691.

by the principle of necessary implication: that creation of the Affiliate is a functional necessity without which INMARSAT would be functionally incapable of providing land mobile services. Indeed, since INMARSAT is already providing a significant volume of land mobile services, this is clearly not the case.

* * *

In conclusion, INMARSAT may not rely on the "doctrine of implied powers" to justify the establishment of the Affiliate. First, under the principle of natural meaning, INMARSAT may not resort to "supplementary means" of interpretation where the language of the Convention, interpreted in its natural and ordinary sense, offers a meaning that is clear and reasonable. The asserted "inconsistency" in the language of Article 15 is no inconsistency at all but a clear prohibition against the establishment of the Affiliate as an activity that is not "consistent with th[e] Convention." Convention, art. 12(1)(b). Second, the "doctrine of implied powers" is without effect in the instant case because the establishment of the Affiliate is contrary to the expressed intention of INMARSAT's constitutive instruments, the Convention and Operating Agreement. Third, the "doctrine of implied powers" is inapplicable because the establishment of the Affiliate is not "essential" to the performance of INMARSAT's duties. In sum, the establishment of the Affiliate would constitute a violation of international law because it would exceed the limits imposed on INMARSAT by its Convention and Operating Agreement.

III. INTERNATIONAL MARITIME SATELLITE TELECOMMUNICATIONS ACT

Congress delimited the authority of COMSAT, the U.S. Signatory of the INMARSAT Operating Agreement, to participate in INMARSAT in the International Maritime Satellite Telecommunications Act ("Maritime Satellite Act"

or "Act").[38/] Although the Maritime Satellite Act does not directly limit the authority of INMARSAT under international law to provide global mobile communications services through the Affiliate, the Act is nevertheless relevant to interpreting the Convention for two reasons.

First, the Maritime Satellite Act is the legislation that authorized the United States to become a party to the Convention and authorized COMSAT to become the U.S. Signatory of the Operating Agreement.[39/] Thus, the Act both constitutes the authority under which the President ratified the Operating Agreement and reflects the views of the President and Congress on the Convention and Operating Agreement. Accordingly, the Act is relevant to the interpretation of those agreements under international law, since presumably the President may act with respect to INMARSAT only within the scope of the statute.[40/]

[38/] Pub. L. 95-564, 92 Stat. 2392 (1978) (codified at 47 U.S.C. §§ 751-757).

[39/] See S. Rep. 1036, 95th Cong., 2d Sess. 5 (1978) ("The committee believes that the Congress must move expeditiously to designate a representative authorized to sign the Inmarsat operating agreement and enable us to become a party to the Inmarsat Convention prior to July 5, 1979."), in 1978 U.S.C.C.A.N. 5272, 5276.

[40/] See Restatement (Third) of the Foreign Relations Law of the United States ("Restatement"), supra note 11, § 326(1) ("The President has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states."). The President approved the Maritime Satellite Act by signing it into law. Furthermore, since the authority to ratify the Convention was conferred upon the President by the Maritime Satellite Act, the authority of the President to interpret the Convention necessarily does not extend beyond the limits established by the Act. This applies not only to the original Convention, but also to the subsequent amendments to the Convention.

(continued...)

Second, the Maritime Satellite Act has practical significance because it only authorizes COMSAT to participate in the provision of maritime communications services by INMARSAT. The fact that COMSAT as the U.S. Signatory of the Operating Agreement is statutorily forbidden from participating in the activities of the Affiliate provides a substantial basis for concluding that the establishment of the Affiliate is not appropriate.

In the course of the ongoing Federal Communication Commission ("FCC") proceedings concerning COMSAT's participation in INMARSAT's proposed provision of global mobile communications services, we have submitted various briefs on Motorola's behalf concerning the authority of COMSAT to participate in the Affiliate under the Maritime Satellite Act and the FCC orders interpreting the Act.[41/]

[40/] (...continued)
The enactment of the Maritime Satellite Act by Congress also has relevance in interpreting the Convention. The Restatement states with respect to treaties that "understandings expressed by the Senate in giving its advice and consent must be respected." Id. § 326, cmt. a. The same principle applies in the case of a congressional-executive agreement like the Maritime Satellite Act, where Congress passes legislation authorizing presidential action, in lieu of advice and consent by the Senate. Id. § 303(2) & cmt. e. Thus, the legislative views expressed in the Maritime Satellite Act are persuasive under international law because they reflect the views of the Senate upon the Act prior to ratification by the President.

[41/] See INMARSAT-P Proceedings, Petition for Declaratory Ruling, at 20-26 (Oct. 21, 1993); Reply Comments in Support of Petition for a Declaratory Ruling, at 5-22 (Dec. 23, 1993); Motorola's Comments in Reply to COMSAT's Further Response, at 2-10 (Apr. 26, 1994); Motorola's Comments on the Proposed Inmarsat Affiliate, at 4-11 (June 23, 1994). These arguments have also been made in letters to the Department of State, Department of Commerce and FCC requesting instructions on July 14, 1993, November 2, 1993, February 15, 1994, April 26, 1994 and July 13, 1994.

Therefore, we set out these statutory and regulatory issues only in summary form in the present opinion letter.

The Maritime Satellite Act authorizes COMSAT to participate in INMARSAT only "for the purpose of providing international maritime satellite telecommunications services."[42/] Congress clearly stated in the legislative history of the Act that COMSAT was only authorized to participate in maritime services, and was precluded from providing other services: "By designating COMSAT to represent the United States in providing international maritime satellite communications, the Committee does not intend to authorize COMSAT to provide other international communications services not contemplated by this bill."[43/]

The FCC has interpreted the Act to permit COMSAT to provide non-maritime services only to the extent that they are "ancillary to and supportive of its provision of maritime services."[44/] More specifically, a non-maritime service provided by COMSAT must satisfy a three-part test:

> (1) [non-maritime] services will be subsidiary to the maritime services which will remain Inmarsat's primary mission;
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> (2) [non-maritime] services and maritime services must be provided over common space satellite resources and ground facilities . . .; and
>
> (3) the resulting integrated operation of the [non-maritime] and maritime services will not

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[42/] 47 U.S.C. § 752(a)(1) (emphasis added); see also 47 U.S.C. § 751(a) (purpose of Maritime Satellite Act is "to develop and operate a global maritime satellite telecommunications system").

[43/] S. Rep. 1036, at 8, 1978 U.S.C.C.A.N. at 5279 (emphasis added).

[44/] Provision of Aeronautical Services via the INMARSAT System, 4 F.C.C.R. 6072, 6086 (1989).

> permit Inmarsat Council decisions regarding the planning and use of space segment to be separated in terms of [non-maritime] and maritime services.[45/]

The proposed services of the Affiliate -- which would far exceed INMARSAT's maritime services in volume, utilize satellites separate from INMARSAT's space segment, and effectively eliminate the decision-making role of the Council -- satisfy none of these conditions.

IV. JURISDICTION AND REVIEWABILITY

We also address the opinion expressed in the C&M Letter that in the case of a dispute over the authority of INMARSAT to establish the Affiliate, "if any of the Parties to the dispute declines to consent to refer the matter to arbitration or the ICJ [International Court of Justice], the Assembly becomes the ultimate authority to resolve such issues of interpretation." C&M Letter at 19.

The C&M Letter is correct that in certain cases, Article 31 of the Convention requires that all parties to a dispute consent before the dispute is submitted for arbitration under the Convention. However, this does not mean that a non-consenting disputant would be precluded from obtaining review of the establishment of the Affiliate.

First, Article 31 does not bar an action in any of various fora, including the domestic courts of national states,[46/] by an entity that is not a Party or Signatory of INMARSAT. Although immunity defenses might limit rights of

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[45/] Id.

[46/] Under certain circumstances, such actions might also be referred to an international tribunal such as the International Court of Justice or the Court of Justice of the European Union.

action, it is entirely possible that some review of any INMARSAT action creating the Affiliate would be available.[47/]

[47/] The Protocol on the Privileges and Immunities of the International Maritime Satellite Organization (INMARSAT) ("Protocol"), which was signed on December 1, 1981, provides an exception to INMARSAT immunity for commercial activities. Protocol, art. 2(1)(a). Although the United States has not signed the Protocol, the Protocol would have force in the courts of those states which have signed and/or ratified it.

Furthermore, a similar commercial limitation on the immunity of INMARSAT would apply in United States courts. The International Organizations Immunities Act, 22 U.S.C. §§ 288-288f, which was applied to INMARSAT by Executive Order 12238, 45 Fed. Reg. 60877 (Sept. 12, 1980), provides that "[i]nternational organizations shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments . . . ." 22 U.S.C. § 288a(b). The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, establishes a commercial exception to the immunity of foreign governments. 28 U.S.C. § 1605(a)(2).

Thus, to the extent the establishment of the Affiliate is regarded as a commercial activity, INMARSAT would probably not be immune from suit. While there is authority under U.S. law that the activities of an international satellite organization are entitled to immunity, see Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 946 F.2d 168 (2d Cir. 1991) (antitrust action involving INTELSAT activities), cert. denied, 112 S. Ct. 1174 (1992), the present case is distinguishable on several grounds: 1) participants in the Affiliate would include purely private commercial entities which are not Signatories to the Operating Agreement; 2) the activities of the Affiliate would go well beyond the central mission of INMARSAT of providing maritime communications services; and 3) INMARSAT's proffered justification for establishment of the Affiliate, i.e., that such an action is "economic, effective and efficient," is a clear statement of the commercial character of the Affiliate's activities.

Second, Article 31(1) indicates that parties might "agree[] to submit [the dispute] to the International Court of Justice . . . ." However, agreement of the parties to a dispute is not necessarily required for its submission to the ICJ, because United Nations organs may independently refer disputes to the ICJ for advisory opinions.[48/]

Third, Article 31 does not bar an action under U.S. law in a U.S. court to challenge the right of COMSAT under the Maritime Satellite Act to participate in the Affiliate. While such an action might not relate directly to the authority of INMARSAT under the Convention and the Operating Agreement, it could have significant practical effect on the ability of INMARSAT to establish the Affiliate.

Fourth, Article 31(2) of the Convention provides that disputes between INMARSAT and one or more of its Parties "under agreements concluded between them" may be submitted to arbitration "at the request of any party to the dispute. . . ." Thus, to the extent the Affiliate is established under an agreement separate from the Convention and Operating Agreement, arbitration may be available under Article 31(2), even where only one party gives, or has in the past given, consent to arbitration.[49/]

V. CONCLUSION

For the reasons set out above, we are of the opinion that INMARSAT's establishment of the Affiliate, as it is presently structured, is legally impermissible under

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[48/] See Charter of the United Nations, art. 96; Statute of the International Court of Justice, art. 65.

[49/] The right to arbitration under Article 31(2) may be of limited practical utility for private parties, because Article 31(2) relates only to disputes between INMARSAT itself and states which are Parties to INMARSAT.

the Convention, the Operating Agreement, the Maritime Satellite Act and relevant principles of international law.

Sincerely,

Monroe Leigh

Monroe Leigh
STEPTOE & JOHNSON